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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF U. S. OIL AND REFINING COMPANY, Appellant, v. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB Nos. 85-163 and 85-214 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the appeals of the imposition of two civil penalties in the sum of $400 each for violations of opacity standards, came on for formal hearing before the Pollution Control Hearings Board; Lawrence J. Faulk (presiding) on November 8, 1985, at Lacey, Washington. The matters were consolidated for hearing. Board members Wick Dufford and Gayle Rothrock have reviewed the record.

Appellant, U. S. Oil and Refining Company appeared by its attorney Michael R. Thorp. Respondent Puget Sound Air Pollution Control Agency (PSAPCA) appeared by its attorney Keith D. McGoffin. The proceedings

were reported by Cheri L. Davidson, Court Reporter, with Gene Barker and Associates.

Witnesses were sworn and testified. Exhibits were admitted and examined. Argument was heard. From the testimony, evidence and argument, the Board makes these

FINDINGS OF FACT

I

Respondent PSAPCA is a municipal corporation with responsibilities for conducting a program of air pollution prevention and control in a multi-county area which includes the site of the instant case. The Agency has submitted a certified copy of its Regulation I. Judicial notice is taken of that document.

II

Appellant is a crude oil refinery located at 3001 Marshall Avenue on the tideflats of Tacoma, Washington. The crude oil is heated sequentially in each of three heaters as a part of the fractionating process. These heaters emit their emissions through stacks to the atmosphere. At the time of the events in question, the heaters burned a combination of fuel oil (80 percent) and treated fuel gas (20 percent) to heat the crude oil.

III

On June 27, 1985, in the morning while on routine patrol, PSAPCA's inspector observed a whitish blue plume of smoke coming from the H-201 heater stack on appellant's property. The inspector was not on Marshall Street but rather stationed himself across intervening

property on East-West Road, about 3,000 feet (over one-half mile) from the emission point. Visibility was good. However, behind the stack was a whitish/blue background of clouds and sky which provided very little, if any, contrast with the plume. From the inspector's vantage, the stack and the plume appeared quite small.

IV

Opacity is the degree to which the visibility through a plume is obscured. An inspector's opacity readings are not derived from a precisely calibrated mechanical instrument. They are based on observation, experience and judgment. They are expessed in terms of percentages, in increments of 5 percent. The standards for certification of plume readers allow for observations to deviate from measured values no more than an average of 7.5 percent. A few deviations of up to 15 percent are allowed.

Here the range of opacity readings exceeding the 20 percent standard was not large--varying between 25 percent and 45 percent. Over a nineteen-minute observation period, opacity was recorded every 15 seconds, a total of 76 readings. Of these, 27 did not exceed 20 percent opacity. Of those over 20 percent opacity, 23 readings were of 35 percent or less.

V

On June 27, 1985, the PSAPCA inspector was the holder of an effective certification from the State Department of Ecology attesting to successful completion of a plume evaluation course on April 17, 1985. This was the thirty-ninth such certification he had received

over the past twelve years.

VI

PSAPCA utilizes the document "Guidelines for Evaluation of Visible Emissions" published by the United States Environmental Protection Agency as guidance for its inspectors. These guidelines (paragraph 3.4.1) suggest that, with good visibility, the observer should be within about a quarter of a mile from the source. There was nothing to prevent PSAPCA's inspector from stationing himself closer to the source than he did on June 27, 1985.

VII

After making his observations on June 27, 1985, PSAPCA's inspector wrote a Notice of Violation No. 20701 and delivered it by hand to John Meland, Operations Superintendent of U. S. Oil and Refining Co. Subsequently, in reporting to PSAPCA, about the event, the company stated that the heater was running at a steady rate when the inspector made his readings. Nothing at all abnormal about operations was noted during that time.

VIII

On July 19, 1985, PSAPCA issued to appellant a civil penalty (6307) for the maximum amount of $400 for exceeding the Agency's opacity standard on June 27, 1985. On August 16, 1985, this Board received appellant's appeal, and it became our cause number PCHB 85-163.

IX

On September 11, 1985, in the morning while on routine patrol,

PSAPCA's inspector observed a plume of black smoke emissions from the same H-201 heater stack of appellant. The inspector properly positioned himself and began his observations. He was within a quarter mile of the source. The black smoke contrasted clearly with the background. His readings indicate that the opacity was thirty to sixty percent over nine and one-half minutes of a fifteen-minute observation period. The inspector also took pictures of the plume which verify his observations. Appellant does not contest the accuracy of these readings.

X

After his observations, on September 11, 1985, PSAPCA's inspector wrote a notice of violation (No. 20269) and hand delivered it to Mr. Casteel, Operations Manager for U. S. Oil and Refining Company.

XI

On September 30, 1985, PSAPCA issued to appellant a civil penalty (6333) for the maximum amount of $400 for exceeding the Agency's opacity standard on September 11, 1985. On October 28, 1985, this Board received appellant's appeal and it became our cause number PCHB 85-214.

XII

Appellant admits that excess omissions did occur on September 11, 1985. However, Mr. Casteel testified that the problem was the simultaneous upset of all four oil burners in the H-201 heater, probably the result of plugged fuel oil burner tips. This was a situation which had never occurred with the unit before and for which

there is no obvious explanation. The heater in question is nearly new, having been installed in July of 1983. The company is now changing the fuel of these heaters to fuel gas entirely, in order to eliminate fuel oil combustion problems.

On September 11, they called in an upset condition to the Agency about thirty minutes after the problem was detected and followed it up with a report sent to PSAPCA on October 2, 1985. They believe it was an unavoidable situation and therefore they should not be fined.

XIII

There is no evidence that the emissions on September 11 directly caused injury to human health, plants, animal life or property, or unreasonably interfered with the enjoyment of life and property. However, this site is located in a federally designated nonattainment area for total suspended particulate matter. This means the national ambient air quality standard for such material (promulgated by the U. S. Environmental Protection Agency) has not been attained and maintained in the area. The standard was established at a level selected for the protection of public health.

XIV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters.

Chapters 43.21B and 70.94 RCW.

II

Article 9 of PSAPCA's Regulation I is entitled "Emission Standards." Section 9.03 reads, in pertinent part, as follows:

> (b) After July 1, 1975, it shall be unlawful for any person to cause or allow the emission of any air contaminant for a period or periods aggregating more than three (3) minutes in any one hour which is:
> (1) Darker in shade than that designated as No. 1 (20% density) on the Ringelmann chart, as published by the United States Bureau of Mines; or
> (2) Of such opacity as to obscure an observer's view to a degree equal to or greater than does smoke described in Subsection 9.03(b)(1);...

WAC 173-400-040(1), in different words, establishes essentially the same standard. The civil penalties levied in both cases before the Board allege the violation of both of these provisions.

III

Appellant U. S. Oil and Refining Company has challenged the validity of the opacity standard of Regulation I, Section 9.03(b) and WAC 173-400-040(1) as applied in these consolidated cases. We conclude that we are not barred from considering this issue by the doctrine of collateral estoppel. The appellant here is a stranger to prior proceedings in which this issue has been raised. Bordeaux v. Ingersoll Rand Co., 71 Wn.2d 392, 429 P.2d 207 (1967). No peculiar facts exist here which call for departure from the normal requirement for mutuality of parties. See Kyreacos v. Smith, 89 Wn.2d 425, 572 P.2d 723 (1977). No appellate decision has established binding precedent on the issue.

IV

Appellant's argument is that no limitation adopted under the Washington Clean Air Act, chapter 70.94 RCW, is valid unless its violation also violates the definition of "air pollution." The definition of "air pollution" is set forth at RCW 70.94.030(2):

> "Air pollution" is presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is, or is likely to be injurious to human health, plant or animal life, or property, or which unreasonably interfere with enjoyment of life and property. (Emphasis added.)

Appellant asserts that the opacity regulations in question are fatally flawed because they do not require proof of harm or the creation of a harmful potential. See Kaiser Aluminum v. PCHB, 33 Wn.App. 352, 654 P.2d 723 (1982).

V

We have rejected this argument in the past as to opacity standards (St. Regis Paper Company v. PSAPCA & DOE, PCHB No. 82-135), and we do so again in these cases. We hold that PSAPCA Regulation I, Section 9.03(b) and WAC 173-400-040(1) as applied are reasonably consistent with the statute they purport to implement, and therefore valid. Weyerhaeuser Co. v. Department of Ecology, 86 Wn.2d 310, 545 P.2d 5 (1976).

VI

Appellant's assertion that regulations must describe harmful or potentially harmful contamination amounting to "air pollution" arises from RCW 70.94.040, a remnant of the original 1957 air pollution law

which makes causing "air pollution" unlawful. The argument's premise is that unless emissions violate RCW 70.94.040, they cannot violate the Washington Clean Air Act.

This may have been the case in 1957. It is not the case today. Over the years the Act has been substantially amended to provide authority to establish more restrictive control requirements by general regulation (e.g., RCW 70.94.331, RCW 70.94.380) or by individual order (e.g., RCW 70.94.152, RCW 70.94.155).

VII

The Washington Act, as now written, follows the pattern of the Federal Clean Air Act, 42 U.S.C. 7401 et sec. The underlying concept is to describe the total pollution budget for the receiving medium (the ambient air) and then to establish specific "end-of-stack" restrictions within that budget directed toward individual sources. In this scheme "air quality standards" describe the aggregate concentrations in the surrounding ambient air which must be maintained in order to avoid the harm of "air pollution." RCW 70.94.030(13). "Emission standards" by contrast are those limitations achievable by existing technology which can be imposed on releases of contaminants from individual sources. RCW 70.94.030(12); RCW 70.94.152.

VIII

The opacity standards of Regulation I, Section 9.03(b) and WAC 173-400-040(1) are "emission standards" as that term is used in the Washington Act. RCW 70.94.030(1), (12), RCW 70.94.331(2)(b), (c).

IX

Basic to the statutory scheme is the understanding that pollution of the air can result from the aggregation of releases from multiple sources. If standards for any one source can be no stricter than the definition of pollution itself, then a single industrial operation could preclude all others from locating nearby and effectively preclude industrial growth. This would fly in the face of legislative intent. See Weyerhaeuser Co. v. SWAPCA, 91 Wn.2d 77, 586 P.2d 1163 (1978); RCW 70.94.011.

X

In 1972, the United States Environmental Protection Agency approved the Washington State Implementation Plan for National Ambient Air Quality Standards, 37 F.R. 10900, with the understanding that stringent "emission standards" could be adopted and enforced in the state. See 42 USC 7410(a)(2)(B). Opacity standards, like the standards at issue, were and are a part of the approved federal-state plan.

Conformity with the Federal Act was made an explicit purpose of the Washington Act by an amendment adopted in 1973. Section 1, chapter 193, Laws of 1973, 1st ex.sess; RCW 70.94.011.

XI

Appellant's position is, in effect, that RCW 70.94.040 contains the exclusive substantive standard enforceable under the Washington Clean Air Act.

This view is at odds with the internal evidence of the Act

itself. By their very nature "emission standards" must ordinarily be more stringent than the condition described by the term "air pollution." Otherwise the legislative direction to establish both "air quality standards" and "emission standards" would be meaningless. The two would have to be the same. Also meaningless would be the power of "local" authorities to adopt emission limits more stringent than the state-wide minimums. See RCW 70.94.331(2)(b), RCW 70.94.380, RCW 70.94.395.

The appellant's view is also at odds with many years of administrative construction at the local, state and federal levels. The Legislature, while adopting numerous amendments, has never seen fit to disturb the administrative construction which supports the validity of emission standards expessed in terms of opacity. The absence of legislative repudiation is highly persuasive. Green River Community College v. Higher Education Personnel Board, 95 Wn.2d 108, 622 P.2d 826 (1980).

We conclude that alterations in the Washington Act over time have eroded the importance of RCW 70.94.040. It is no longer the substantive core of the Act. The law of air pollution control is now primarily contained in regulations and orders adopted according to specific later-enacted statutory mandates.

XII

Since 1969, RCW 70.94.431 has empowered DOE and "local" authorities to assess civil penalties for the violation of air pollution control regulations.

In 1984, the Legislature amended this section to increase the ceilings on civil penalty assessments. Section 2, chapter 255, laws of 1984. As a part of this amendment, the Legislature expressly established a penalty limit "for the violation of any opacity standard." Indirectly, this must ratify the validity of the opacity standards to which a penalty might relate.

XIII

We do not believe the case of Kaiser Aluminum v. PCHB, 33 Wn. App. 352, 654 P.2d 723 (1982) is controlling here. That case involved a regulation dealing with the deposit of particulate matter on the property of others, not with opacity limitations or any other technology-based emission standards. The regulation in Kaiser was not an "end-of-stack" limitation, but rather a restriction concerned with direct environmental harm. As such, its vice was the failure to describe the harm it was aimed at in "air pollution" terms. The regulation at issue in the instant case is of a completely different type and its validity is governed by different statutory provisions.

XIV

Having sustained the regulations as applied, we turn to the asserted offenses themselves.

As to the incident of June 17, 1985, we are influenced by a number of factors: long distance between the observer and the plume, the lack of a contrasting background, the smallness of the target observed, the relatively small variations in opacity observed, the lack of any abnormal factors affecting the operation of the burners at

the time. No one of these factors is determinative, but taking them all together, we conclude that the evidence fails to preponderate in favor of finding a violation.

VX

As to the incident of September 11, 1985, we conclude that a violation of the 20 percent opacity standard was shown. Appellant argues that the event should be excused because it was an unanticipated upset. However, section 9.16 of Regulation I which allowed an upset condition to be used as an excuse for not meeting standards was repealed on May 10, 1984. WAC 173-400-120 was amended to similar effect on April 15, 1983.

The civil penalty section of the Washington Clean Air Act, RCW 70.94.431, authorizes the imposition of fines on a strict liability basis. There is no "scienter" requirement for violations as a civil matter. See Frame Factory v. Department of Ecology, 21 Wn.App. 50, 583 P.2d 660 (1978), Section 2, Chapter 175, Laws of 1980. Air contaminant sources are required to conform to the standards established.

XVI

Although explanations can influence the determination of whether the amount of penalty is appropriate in a given case, we conclude, under all the circumstances, that the $400 penalty levied for the September 11, 1985, violation is reasonable. The violation was clear. The problem was with the company's equipment. This was not appellant's first opacity violation involving the H-201 heater since

it was installed.

XVII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

Notice and Order of Civil Penalty No. 6307 concerning emissions on June 27, 1985, is reversed. Notice and Order of Civil Penalty No. 6333 concerning emissions on September 11, 1985, is affirmed.

DONE this 31st day of January, 1986.

POLLUTION CONTROL HEARINGS BOARD

1/30/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member